MONTANA LEGISLATIVE HISTORY

Chapter 228 19 69

Bill H 68 S _____ Original bill & history ✓ C

H. Committee on Judiciary		S. Committee on Judiciary	
Hearing Date(s) 1/10	✓ C	Hearing Date(s) 1/27	✓ C
1/13	✓ C	2/14	✓ C
	C	2/22	✓ C
	C		C
Date Out	C		

Did this bill originate in an interim committee? ____ Yes ✓ No

Committee _____ Report _____

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House BILL NO. 68

INTRODUCED BY Howard Mather

94-4807, 94-6806, 94-6807, 94-6808, 94-7234

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE RULES GOVERNING THE DEFENSE OF DOUBLE JEOPARDY, PROVIDING WHEN SUCH DEFENSE SHALL OR SHALL NOT BE A BAR TO A SECOND PROSECUTION AND DEFINING WHEN CONDUCT ARISING OUT OF THE SAME TRANSACTION MAY OR MAY NOT ESTABLISH THE COMMISSION OF MORE THAN ONE OFFENSE; REPEALING SECTIONS 94-4807, 94-6806, 94-6807, 94-6808, AND 94-7234, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

Section 1. DEFINITION OF TERMS.

(a) SAME TRANSACTION. The term same transaction shall include conduct consisting of:

(1) a series of acts or omissions motivated by a purpose to accomplish a criminal objective, and necessary or incidental to the accomplishment of that objective; or

(2) a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

(b) INCLUDED OFFENSE. An offense is an included offense when:

(1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(2) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(3) it differs from the offense charged only in the respect that a less

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serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

Section 2. METHOD OF PROSECUTION WHEN CONDUCT CONSTITUTES MORE THAN ONE OFFENSE. When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to establish the commission of the offenses; or

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Section 3. WHEN PROSECUTION BARRED BY FORMER PROSECUTION. Provided the offenses, if more than one, were known to the attorney prosecuting upon sufficient evidence to justify the filing of an information or the issuance of a warrant of arrest and were consummated prior to the original charge, and provided the jurisdiction and venue of the several offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in

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a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense than the offense charged which is subsequently set aside is an acquittal of the greater inclusive offense that was charged.

(b) The former prosecution was terminated, after a complaint had been filed on a misdemeanor charge, after an information had been filed or an indictment found on a felony charge, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(c) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in:

(1) a judgment of conviction which has not be reversed or vacated,

(2) a verdict of guilty which has not been set aside and which is capable of supporting a judgment, so long as failure to enter judgment was for a reason other than a motion of the defendant,

(3) a plea of guilty accepted by the court, so long as failure to enter judgment was for a reason other than a motion of the defendant.

(d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(1) The defendant consents to the termination or waives his right to object to the termination.

(2) The trial court, in the exercise of its discretion, finds that the termination is necessary because:

(i) it is physically impossible to proceed with the trial in conformity

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with law; or

(ii) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(iii) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state; or

(iv) the jury is unable to agree upon a verdict; or

(v) false statements of a juror on voir dire prevent a fair trial.

Section 4. FORMER PROSECUTION IN ANOTHER JURISDICTION: WHEN A BAR. When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate and/or concurrent jurisdiction in this state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

(a) The first prosecution resulted in an acquittal or in a conviction as defined in Section 3 and the subsequent prosecution is based on an offense arising out of the same transaction.

(b) The former prosecution was terminated, after the complaint has been filed on a misdemeanor charge, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

Section 5. FORMER PROSECUTION BEFORE COURT LACKING JURISDICTION OR WHEN FRAUDULENTLY PROCURED BY THE DEFENDANT. A prosecution is not a bar within the meaning of Section 3 and 4 under any of the following circumstances:

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(a) The former prosecution was before a court which lacks jurisdiction over the defendant or the offense; or

(b) The former prosecution was procured by the defendant without the knowledge of the proper prosecuting officer or with the purpose of avoiding the sentence which might otherwise be imposed; or

(c) The former prosecution resulted in a judgment of conviction which was held invalid in any post-conviction hearing.

Section 6. Sections 94-4807, 94-6806, 94-6807, 94-6808, 94-7234, R.C.M., 1947 and all acts and parts of acts in conflict herewith are hereby repealed.

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JUDICIARY COMMITTEE

41st Legislative Assembly

Bill No.	Subject Matter	Date In	Hearing Date	Comments	Date Out	Committee Action	Final Action
HB 68 Harrison, Mather	Providing rules governing defense of double jeopardy and saying that when such defense shall not be a bar to a second prosecution	1/7	1/10		1/13	DO PASS	
HB 69 Harrison, Mather	Permitting prosecuting attorneys and defendants to engage in plea discussions under special circumstances in criminal cases.	1/7	1/10		1/13	DO PASS	Killed by Senate
HB 84 Lucas, et al	Fix salaries for Chief Justice and Associate Justices of the Supreme Court.	1/7	1/9	Action to be taken first of the week.	1/14	DO PASS	
HB 85 Lucas, et al	Fix salaries for the District Court Judges.	1/7	1/9	Action to be taken first of the week.	1/14	DO PASS	
HB 89 Forester, Fagg, et al	Act amending to provide that persons actually paying real estate taxes may vote in city elections on additional levy.	1/8	1/16	Referred to sub-committee	1/24	DO NOT PASS	Killed by House
HB 95 Judiciary Committee	An act to approve and legalize and adopt as prima facie the Laws of Montana.	1/8	1/13		1/13	DO PASS	SIGNED BY GOVERNOR
HB 107 Goan, Mather et al	Act to submit to qualified electors amendment to Section 2, Article IX of Constitution.	1/8		Original Bill returned to Chief Clerk on 1/9/69.			

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January 10, 1969

JUDICIARY COMMITTEE

The meeting of the House Judiciary Committee was held in the Committee Room 300 of the Capitol Building at 9:00 a.m., January 10, 1969. Mr. James E. Murphy, Chairman, presided. All members were present except Representative Stimatz.

Chairman Murphy introduced Capt. Robert McKay of the Montana Highway Patrol who was a proponent for HB 34, HB 47, HB 63 and HB 64. Capt. McKay then gave a short talk on each of the bills and why he recommended approval of same. Several questions were asked of Capt. McKay on each of the proposed bills and Capt. McKay was then excused.

Chairman Murphy then introduced Judge Castles who spoke on HB 36, HB 68 and HB 69. Committee members asked questions of Judge Castles on these bills. Judge Castles left mimeographed discussions (Plea Discussion and Agreement and Double Jeopardy) copies of which are attached to these minutes. Judge Castles was then excused.

Chairman Murphy then introduced Mr. Ulmer who had introduced HB 63 and HB 64 by request and stated that if this committee recommended passage of either or both he would forget the "by request" and carry the bill or bills to the floor. It was stated that Capt. McKay from the Highway Patrol had explained the bills to the committee very well. Mr. Ulmer was then excused.

Chairman Murphy then announced that House Bill 56, relating to hearings and judgments in juvenile matters, would not be heard today because someone from the department wanted to appear and could not make it today; therefore, hearing of this bill has been continued to Wednesday, January 15, 1969.

Chairman Murphy stated that the next bill for consideration was House Bill 36, authorizing Supreme Court of Montana to regulate pleading, practice and procedure and asked if there was any further discussion on same.

It was moved by Representative Warfield that House Bill 36 DO PASS. The motion was seconded by Representative Speare and upon being put to a vote was unanimously carried.

The next bill for discussion was House Bill 68, rules governing the defense of double jeopardy. Representative Loble stated that he would like more time to study and consider this bill and House Bill 69, act to authorize and permit prosecuting attorneys and defendants to engage in plea discussions. It was agreed that these bills would be discussed further and voted upon next week.

The next bill for consideration and discussion was House Bill 47, creating a minimum fine for violation of any laws governing driver licensing. Representative Harrison moved that the committee do pass this bill. The motion was seconded

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by Representative Hemstad. After a lengthy discussion, a vote was taken and the motion did not carry as the majority of the committee members voted DO NOT PASS.

House Bill 63, to define conviction was next on the agenda. Representative Baeth moved that HB 63 DO NOT PASS, and was seconded by Representative Loble. The motion carried unanimously.

House Bill 64, to delete discretionary suspension authorized for offenses for which mandatory revocation of drivers license was then considered. Representative Harrison moved that bill bill DO PASS AS AMENDED and was seconded by Representative Scott. The motion carried unanimously.

Chairman Murphy stated that HB 110 was on highway eminent domain and that would be set for hearing at a later date.

Chairman Murphy stated that the committee would not meet again until Monday, January 13, 1969.

There being no further business to come before the meeting, the same was adjourned.

James E. Murphy, Chairman

Val Cole, Secretary

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PLEA DISCUSSION AND AGREEMENT
Criminal Law Commission Meeting, March 9, 1968

The plea of guilty is probably the most frequent method of conviction in all jurisdictions; in some localities as many as 95% of criminal cases are disposed of in this way. The assumption underlying the proposed standards is that conviction without trial will and should continue to be a most frequent means for the disposition of criminal cases. This assumption is not based upon notions of expediency, but rather upon the conclusion that a number of values are served by the disposition of many criminal cases without trial. By his plea, the defendant aids in ensuring the prompt and certain application of correctional measures to him. He also aids in avoiding delay in the disposition of other cases, thereby increasing the probability of prompt and certain application of correctional measures to other offenders.

In addition, the plea provides a means by which the defendant may acknowledge his guilt and manifest a willingness to assume responsibility for his conduct. Also, in some cases the plea will make it possible to avoid a public trial when the consequences of such publicity outweigh any legitimate need for a public trial. Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment. Such pleas also make it possible to grant concessions to a defendant who has given or offered cooperation in the prosecution of other offenders.

From the enumeration of these benefits it is seen that the objective of a statutory model should not be to bring about a substantial shift away from the practice whereby trial-avoiding pleas are obtained and accepted. Rather, the attempt should be to formulate procedures which will maximize the benefits of conviction without trial and minimize the risks of unfair or inaccurate results.

An important objective of any statutory model on plea discussion and agreement is that the practice be less suspect; better, not suspect at all. The President's Task Force on Courts has commented:

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> Few practices in the system of criminal justice create a greater sense of unease and suspicion than the negotiated plea of guilty.

This reservation about the practice may result from the fact that when plea negotiations are conducted, they usually are conducted informally and out of sight, and the issue in a plea negotiation typically is how much leniency an offender will be given in return for a plea of guilty. The President's Commission on Law Enforcement and Administration of Justice has promulgated certain guidelines intended to ameliorate these deficiencies. The Commission recommends:

> If a negotiated agreement to plead guilty is reached, care should be taken by prosecutor and defense counsel to state explicitly all its terms.
>
> Upon the plea of guilty in open court the terms of the agreement should be fully stated on the record and, in serious or complicated cases, reduced to writing.

The American Bar Association's Advisory Committee on Criminal Trial has recommended certain standards relating to pleas of guilty. Their recommendations will serve as the basis for the following statutory model. The Committee's report is, of course, an integral package. In part, it covers subject matter already treated by the current Montana code of criminal procedure. Where the provisions of the Committee's report are duplicative of Montana code provisions which do not need modification, they will be omitted from discussion. Certain of the Montana code provisions, however, may need modification.

Part I. Receiving and Acting Upon the Plea

Section 1. Pleading by defendant; alternatives.

Comments:
The existing Montana provision concerning this subject matter, R.C.M. 95-1606(e), may be retained without change. It reads as follows: "The defendant shall enter a plea of guilty or not guilty to the indictment, information or complaint. If the defendant refuses to plead to the indictment, information or complaint a plea of not guilty must be entered." See also, R.C.M. 95-1902.

Section 2. Pleading to other offenses.

Upon entry of a plea of guilty or after conviction on a plea of not guilty, the defendant's counsel may request permission for the defendant to enter a plea of

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guilty as to other crimes he has committed which are within the jurisdiction of coordinate courts of that state. Upon written approval of the prosecuting attorney of the county in which these crimes are charged or could be charged, the defendant should be allowed to enter the plea. Entry of such a plea constitutes a waiver of the following: (i) venue, as to crimes committed in other counties of the state; and (ii) formal charge, as to offenses not yet charged.

Comments:
It is not unusual for a defendant to have committed several crimes in more than one county of the state. If the defendant is willing to enter a plea of guilty to such offenses, several separate proceedings should not be required to accomplish that result. It is also usually preferable to have one judge impose sentence on all the offenses at one time.

The above standard makes it possible for a defendant to seek a simultaneous disposition as to all offenses he has committed in the state, whether or not he has been theretofore charged with all of these offenses. Such a disposition can be of considerable benefit to the defendant: (1) he will be able to start with a clean slate when he is released from prison; (2) he may gain some benefit from the imposition of concurrent sentences or similar consideration in sentencing; and (3) he can avoid the risk of an intrastate detainer being lodged against him while he is serving his sentence. The public is also benefited by a prompt disposition as to all those offenses.

The above provision may be compared with the treatment given the subject by the Model Penal Code, sec. 7.05(4), which reads: "When the defendant has asked that other crimes admitted in open court be taken into account when he is sentenced and the Court has not rejected such request, the sentence shall bar the prosecution or conviction of the defendant in this State for any such admitted crime."

Section 3. Aid of counsel; time for deliberation.

(a) Aid of counsel.

(b) Time for deliberation.

Comments:
This subject matter is covered adequately by chapter 9 on the initial appearance of the arrested person and by chapter 16 on the arraignment of the defendant, specifically R.C.M. 95-1607 (Time allowed to answer). The Committee provision on time for deliberation is more rigorous in ameliorating the problem of "quick justice" than the analogous provision in the Montana code. Its thrust is that even if the defendant has effectively waived counsel he nonetheless should not be hurried through the plea of guilty process without sufficient time to consider his decision. Thus it is required that a defendant without counsel cannot be called upon to plead to a serious offense until a reasonable time following the date he was held to answer. This argument does not seem strong enough, however, to require reconsideration of the Montana provision.

Section 4. Defendant to be advised by court.

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Comments:
This subject matter is adequately covered by chapter 9 on the initial appearance of the arrested person, by chapter 16 on the arraignment of the defendant, and by R.C.M. 95-1902 (Plea of Guilty).

Section 5. Determining voluntariness of plea.

Comments:
This subject matter is adequately covered by R.C.M. 95-1606(e).

Section 6. Determining whether plea is result of discussion-agreement.

By inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court. The court should then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.

Comments:
This provision is based on the assumption that is is preferable for the in-court inquiry to give visibility to the plea discussions-plea agreement process. Such inquiry will disclose whether there is reason for the court to caution the defendant of the court's independence from the prosecutor. This caution will prevent the defendant from being able to challenge his plea later on the ground that he thought the court's awareness of the promises made at the time the plea was received meant that they were then and there accepted by the court.

Section 7. Determining accuracy of plea.

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea.

Comments:
Current law on guilty pleas places almost exclusive emphasis upon the need for pleas to be voluntary. No inquiry into the underlying facts concerning the defendant's conduct is required. It is undoubtedly true that the great majority of defendants who enter a plea of guilty are guilty either of the offense charged or of a more serious offense. However, the risk that a plea which is obtained without resort to threats or other improper inducements and which is entered with full understanding of the possible consequences might nonetheless be inaccurate remains a matter of concern. The defendant may not completely understand what mental state and acts constitute commission of the offense charged, and it may be that his conduct is not

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as serious as that charged or that he has a valid defense to the charge. A guilty plea may be entered by a psychiatrically distrubed person. A clearly rational defendant may enter a false plea in the hope of achieving some goal, as where an innocent defendant is seeking to protect another person. These and similar situations have been observed from time to time.

Many commentators and judges have expressed concern about this problem and have attempted to alleviate it. Federal Rule 11 has recently been revised to conform to the above standard. Note that the matter is left largely to the discretion of the judge. The circumstances of the case will often dictate the kind and amount of inquiry which is necessary.

The Committee noted that although inquiry into the accuracy of guilty pleas deprives the guilty plea process of some of its efficiency, the benefits derived for defendants and for the system would far outweigh any loss in efficiency. First, inquiry would ensure that the defendant actually committed a crime at least as serious as the one to which he is willing to plead. Secondly, investigation into the factual basis of guilty pleas acts to increase the visibility of charge reduction practices. In addition, these inquires provide a more adequate record of the conviction process; this record minimizes the chances of a defendant successfully challenging his conviction later, and also aids correctional agencies in the performance of their functions. Finally, increased knowledge about the circumstances of the defendant's offense provides the court with a better assessment of the defendant's competency, his willingness to plead guilty, and his understanding of the charges against him.

Section 8. Record of proceedings.

Comments:
This subject matter is adequately covered by R.C.M. 95-1606(f).

Section 9. Consideration of plea in final disposition.

(a) It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty when the interest of the public in the effective administration of criminal justice would thereby be served.

(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty.

Comments:
The Committee considered several factors to be appropriate in determining the question raised by subsection (a). These included:

(i) that the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him;

(ii) that the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct;

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(iii) that the concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;

(iv) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;

(v) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct;

(vi) that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

Query: Would not our intended reform of the sentencing laws to give trial judges greater breadth than has heretofore been the case obviate the problem intended to be met by (iii) above?

Part II. Withdrawal of the Plea

Section 10. Plea withdrawal.

Comments:
This subject matter is adequately covered by R.C.M. §§ 95-1902 and 95-2207. These sections provide a general standard by which the withdrawal of the plea may be governed; case law provides the specific grounds. Such case law may be insufficient in one respect. A basis for withdrawal of the plea should be constituted by the fact that the defendant did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or to oppose the concessions as promised in the plea agreement. This would, of course, not be a traditional ground for granting withdrawal of the plea and would probably not be contemplated by R.C.M. 95-1902(c).

Section 11. Withdrawn plea not admissible.

A plea of guilty which is not accepted or has been withdrawn should not be received against the defendant in any criminal proceedings.

Comments:
There is currently a split of authority on the question of whether a withdrawn guilty plea may be admitted into evidence. Some courts, by reference to the evidentiary rules authorizing the reception of admissions against interest, hold that the plea may be admitted, although the accused may then attempt to explain the plea. In other jurisdictions, it is held that the judicial action permitting withdrawal of the plea adjudicates the impropriety or improvidence of its prior reception and forbids any subsequent evidentiary use of the plea. The latter view is adopted in the above standard as more in keeping with the preceding provisions on withdrawal.

See comments to section 14.

Part III. Plea Discussions and Plea Agreements

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Section 12. Propriety of plea discussions and plea agreements.

(a) In cases in which it appears that the interest of the public in the effective administration of criminal justice would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(b) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty;

(ii) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty to another offense reasonably related to defendant's conduct; or

(iii) to seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty.

(c) Similarly situated defendants should be afforded equal plea agreement opportunities.

Comments:
The Committee included a separate section concerning the relationship between defense counsel and client. The subject matter would seem more appropriately a canon of ethic than a statute and so is included here only in the comments:

(a) Defense counsel should conclude a plea agreement only the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty is ultimately made by the defendant.

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by him or the defendant in reaching a decision.

Section 13. Responsibilities of the trial judge.

(a) The trial judge should not participate in plea discussions.

(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty in the expectation that other charges before the court will be dismissed or that sentence concessions will be granted, upon request of the parties

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the trial judge shall permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He shall then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the ~~information in the~~ pre-sentence investigation report is consistent with the representations made to him.

Comments:
The President's Commission's report (p. 136) and the Task Force's procedure (pp. 12-13) would have the judge join the prosecutor and the defense counsel in both the plea discussion--not as a party to the negotiations but as an examiner to insure fairness--and the plea agreement. Further, he would be required to indicate whether he will follow the agreement before the plea is entered. After plea entry, the Task Force would require the judge to determine whether "undue pressure" has been put on the defendant to plead guilty. Under the A.B.A.'s procedure the judge does not join in the plea discussion, nor is he required to indicate whether he would follow the agreement, but he may, on counsels' request, indicate what the probable sentence would be, assuming the facts and circumstances turn out to be as represented.

The above standard adopts parts of both procedures. The judge is not made a part of the proceeding, but he is required to indicate whether he will follow the agreement before the plea is entered. To hold that his duties in this regard were permissive only would be to eviscerate the procedure's effectiveness.

The A.B.A. committee felt there were a number of valid reasons for keeping the trial judge out of the plea discussions, including the following: (1) judicial participation in the discussions can create the impression in the mind of defendant that he would not receive a fair trial were he to go to trial before this judge; (2) judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of the pre-sentence investigation report; and (4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent.

Section 14. Discussion and agreement not admissible.

Unless the defendant subsequently enters a plea of guilty which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceeding.

Comments:
Sections 11 and 14 are evidentiary provisions and might be organized in a separate Part at the end of this Article. For the purposes of continuity, however, section 11 has been left, for the moment, in Part II on Withdrawal of the Plea.

Final Note:

The A.B.A.'s procedure set forth above was designed for serious crimes. The

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A.B.A. points out that a ~~simpler procedure~~ might ~~be considered~~ for use in courts handling the less serious crimes. Under this simpler procedure, the judge would not be involved in either the discussion or the agreement. The only agreement coming out of the plea discussion between the prosecutor and the defendant or defense counsel would be the prosecutor's promise to recommend a specific sentence if the defendant were to plead guilty. A seriatim consideration of the mechanics of such a procedure follows:

1. The court would advise all defendants and counsel in court of the statutory range of sentences, maximum and minimum, and the court's sentencing practices in the run-of-the-mill cases pertinent to the case in issue. For example, the court might state: "I cannot tell you what your particular sentence will be, but I can say that in the usual case of drunk in public, absent any priors or aggravating circumstances such as fighting, damage to persons or property, etc., the sentence of this court usually is $_____."

2. If it appears that a "negotiated" plea is offered, the court would ask both the prosecutor and defense counsel for their recommendations regarding sentence.

3. If recommendations are made, the court would advise the defendant that they are not binding on the court.

4. The court would finally ask the defendant whether he still wants to plead guilty, and would accept the plea if offered.

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Final Draft of the Criminal Law Commission

Prefatory Note:

The concept of double jeopardy stems from the Constitution: "...nor shall any person be twice put in jeopardy for the same offense." Mont. Const., Art. III, Section 18. The chief aim of these provisions is to avoid harassing prosecutions, and to state in legislative form solutions to several problems of double jeopardy, some settled by precedent and others not. In avoiding undue harassment of the defendant, the intent is still not to impugn in any way the ability of the state to maintain one successful prosecution. R.C.M. 1947, Sec. 94-4807, 94-6806, 94-6807, 94-6808 and 94-7234 would be repealed by this legislation. The law embodied in these statutes has not been substantially changed by this draft, but has been brought together in a comprehensive treatment of double jeopardy.

Section 1. Definition of Terms.

(1) Same Transaction.

The term same transaction shall include conduct consisting of:

a. a series of acts or omissions motivated by a purpose to accomplish a criminal objective, and necessary or incidental to the accomplishment of that objective; or

b. a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

(2) Included Offense.

An offense is an included offense when:

a. it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

b. it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

c. it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

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Section 2. Method of Prosecution When Conduct Constitutes More Than One Offense. When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to establish the commission of the offenses; or

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Comments: Sec. 2 is taken from the Model Penal Code, Sec. 1.07.
Part (a) prohibits conviction of both an offense and an included offense based upon the same conduct. For example, to allow a conviction for both an offense and an attempt to commit that offense based upon the same conduct would be a perversion of the attempt statute.

Part (b) prohibits, under certain circumstances, conviction for both a criminal conspiracy and a completed offense which was the object of the conspiracy. A conspiracy to commit an offense, like an attempt, may consist merely of preparation to commit that offense. Since the conspiracy is punishable in the same degree as the completed offense, conviction of either adequately deals with such conduct. This would not be true, however, where the conspiracy has as its objective a crime or crimes other than the crime charged. This involves a distinct danger additional to that involved in the actual commission of any specific offense. Therefore, the limitation of the draft is confined to the situation where the completed offense was the sole criminal objective of the conspiracy.

Part (c) prohibits the conviction for two offenses which require inconsistent findings of fact to establish their commission. Decisions are uniform to the effect that both convictions cannot stand. For example, there cannot be coincident convictions of both first and second degree burglary arising out of the same act. This paragraph does not preclude conviction on one count which is inconsistent with an acquittal on another count. On this issue courts are divided.

Part (d) prohibits the conviction under both a general and a specific statute. Thus a person could not be convicted, for the same conduct, under a general statute prohibiting lewd conduct and also under a specific statute prohibiting indecent exposure

Part (e) deals with the continuing offense. If a statute prohibits a continuing

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course of conduct only one conviction is possible based upon a single (indictment) course of such conduct. Thus, a person violates an unlawful cohabitation statute only once, no matter how long his unlawful cohabiting continues unless the conduct is interrupted, by issuance of process or otherwise, or unless the statute prescribes that specific periods constitute separate offenses.

Section 3. When Prosecution Barred by Former Prosecution.

Provided the offenses, if more than one, were known to the attorney prosecuting upon sufficient evidence to justify the filing of an information or the issuance of a warrant of arrest and were consummated prior to the original charge, and provided the jurisdiction and venue of the several offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense than the offense charged which is subsequently set aside is an acquittal of the greater inclusive offense that was charge

(b) The former prosecution was terminated, after a complaint had been filed on a misdemeanor charge, after an information had been filed or an indictment found on a felony charge, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(c) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in:

(i) a judgment of conviction which has not been reversed or vacated,

(ii) a verdict of guilty which has not been set aside and which is capable of supporting a judgment, so long as failure to enter judgment was for a reason other than a motion of the defendant,

(iii) a plea of guilty accepted by the Court, so long as failure to enter judgment was for a reason other than a motion of the defendant.

(d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termina-

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tion is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

1. The defendant consents to the termination or waives his right to object to the termination.

2. The trial court, in the exercise of its discretion, finds that the termination is necessary because:

(i) it is physically impossible to proceed with the trial in conconformity with law; or

(ii) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(iii) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the State; or

(iv) the jury is unable to agree upon a verdict; or

(v) false statements of a juror on voir dire prevent a fair trial.

Comments:
This section is primarily taken from the Model Penal Code, Sec. 1.08, although the first paragraph is new. The rationale behind the paragraph is this: If the county attorney has probable cause for the filing of the information on the issuance of an arrest warrent, he will go before the proper magistrate who either allows the filing of the information or the issuing of the warrant or denies it if there is insufficient probable cause. Later if the defendant raises the defense that the county attorney had knowledge and evidence of prior offenses when he was charged with the former prosecution there is a court record stating that there was insufficient probable cause at the time, thus protecting the county attorney's record and assuring his legal ability to file the charge after additional evidence has been accumulated.

Part (a) sets out what constitutes an acquittal. Also a finding of guilty of a lesser included offense than the offense charged which is later set aside is an acquittal of the greater offense charged under this section. The U.S. Supreme Court in Green v. U.S., 355 U.S. 184, held that under the double jeopardy clause of the 5th Amendment a defendent charged with first degree murder and convicted of second degree murder, who obtains a reversal on appeal, may not again be tried for first degree murder.

Under part (b) it is assumed that any final order or judgment, meeting the other requirements of that part, ought to constitute a bar even though entered prior to trial and thus prior to the attaching of jeopardy. Illustrative of pre-trial determinations which will bar a subsequent prosecution for the same offense are: (a) a determination that the statute of limitations has run; (b) a determination that the defendant has been previously convicted or acquitted of the offense; (c) a determination that the defendant has been pardoned for the offense; (d) a determination that the defendant has been granted immunity by law from prosecution for

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the offense. The determination may be of either law or fact, if necessarily inconsistent with a proposition of law or fact that must be established for conviction. A fact must therefore be an "ultimate fact." If not, this provision does not provide a bar. Neither would an order or judgment, which is not final, be a bar.

Subparagraphs (i) to (v) indicate that there are five general reasons which justify termination:

(1) Physical necessity. This may result from such contingencies as the death or illness of the judge, a juror, attorney, or a member of their immediate families.

(2) Legal necessity. This may result from a void indictment or information or some other serious procedural defect. Illustrative is the failure of a trial judge to allow the defendant to exercise his full quota of peremptory challenges.

(3) Prejudicial conduct. The prejudicial conduct may be by one of the lawyers or the judge; by a juror; or by someone not directly connected with the trial through a newspaper article; or presumably by a congressional committee.

(4) A "Hung Jury." It is universally held that a dismissal because of inability of the jury to reach a verdict is no bar to a subsequent prosecution.

(5) False Statements of Juror on Voir Dire. Through this would probably by covered by the general language of (2) above, it is sufficiently important to merit specific attention.

Section 4. Former Prosecution in Another Jurisdiction: When a Bar.

When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate and/or concurrent jurisdiction in this State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

(a) The first prosecution resulted in an acquittal or in a conviction as defined in Section 3 and the subsequent prosecution is based on an offense arising out of the same transaction.

(b) The former prosecution was terminated, after the complaint has been filed on a misdemeanor charge, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

Comment:
This section is taken from the Model Penal Code. Sec. 1.10 and is no change from prior law Sec. 94-5617 and 94-5618 which has been repealed. The final provision of the statute makes res judicata applicable between jurisdictions, provided the adjudication of the foreign jurisdiction took the form of a final order or judgment on the merits.

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Section 5. Former Prosecution Before Court Lacking Jurisdiction or When Fraudulently Procured by the Defendant.

A prosecution is not a bar within the meaning of Section 3 and 4 under any of the following circumstances:

(a) The former prosecution was before a court which lack jurisdiction over the defendant or the offense; or

(b) The former prosecution was procured by the defendant without the knowledge of the proper prosecuting officer or with the purpose of avoiding the sentence which might otherwise be imposed; or

(c) The former prosecution resulted in a judgment of conviction which was held invalid in any post-conviction hearing.

Comment: This Section is taken from the Model Penal Code, Sec. 1.11. Under part (a) all courts would agree that a former trial is not a bar unless the court had jurisdiction.

Part (b) avoids the possibility that the defendant might continue, for example, to be prosecuted before the justice of the peace before the full story was known, plead guilty and receive a minor fine for a serious offense. The proposed statement rests upon the assumption that the state is adequately protected if the proper attorney for the prosecution has notice of the proceeding.

Part (c) provides that no bar is created when a judgment is invalidated through defendants collateral attack as by a writ of habeas corpus.

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January 13, 1969

JUDICIARY COMMITTEE

The meeting of the House Judiciary Committee was held in the Committee Room 300 of the Capitol Building at 9:00 a.m., January 13, 1969. Mr. James E. Murphy, Chairman, presided. All members were present except Represenatives Scott, Smith, Spear, Stimatz and Warfield.

Chairman Murphy announced that the first bill to be considered would be House Bill No. 23, Act to establish a maximum amount of money withdrawn from court without bond. Representative Robert F. Dye, a co-sponsor of this bill was present and introduced Donald D. MacPherson, representing the State Highway Commission.

Mr. MacPherson then spoke as a proponent for this bill. He first gave a brief rundown on just how highway condemnation proceedings were handled and then explained what this bill really meant.

Chairman Murphy then asked Committee members if there were any questions to be asked of Mr. MacPherson. After several questions and answers, the witness was excused.

Chairman Murphy then announced that the meeting was open to discussion on House Bill No. 23. After some discussion a motion was made by Representative Loble and seconded by Representative White that House Bill No. 23 DO NOT PASS. The motion carried unanimously.

Chairman Murphy announced that House Bill No. 134, relating to authorizing school districts to retain legal counsel at discretion of the trustees of the school districts, had been referred to this committee. House Bill No. 56, relating to hearings and judgments in juvenile matters, would be heard on Wednesday, January 15, 1969.

House Bills No. 68 and 69 had been deferred from action at the request of Representative Loble. Chairman Murphy asked if he and the committee were prepared to take action on these bills. Mr. Loble then stated that House Bill No. 69, was the Act to authorize and permit prosecuting attorneys and defendants to engage in plea discussions. He thereupon stated that he had read the reports left by Judge Castles. Representative Loble then made a motion that House Bill No. 69 DO PASS. It was seconded by Representative Harrison and upon being put to a vote, the motion was carried unanimously.

On House Bill No. 68, being the Rules governing the defense of double jeopardy, Representative Loble asked that the same be discussed a little more at this meeting. The meeting was then open to discussion. After a lengthy discussion, Representative Loble made a motion that House Bill No. 68 DO PASS. It was seconded by Representative Williams and upon being being put to a vote, was unanimously carried.

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COMMITTEE ON JUDICIARY

HOUSE BILL NO.	ENTERED COMM.	OUT OF COMM.	DO PASS	DO NOT PASS	DO PASS AS AMENDED	BE CONCURRED IN	BE CONCURRED IN AS AMENDED	BE NOT CONCURRED IN	
6	Jan. 16	Jan. 18				X			
36	Jan. 16	Jan. 28						X	
58	Feb. 10	Feb. 19					X		
64	Jan. 16	Feb. 19				X			
68	Jan. 17	Feb. 23				X			
69	Jan. 18	Feb. 23						X	
80	Jan. 29	Feb. 19				X			
94	Feb. 5	Feb. 26						X	
95	Jan. 17	Jan. 23				X			
106	Jan. 21	Feb. 18				X			
109	Jan. 18	Feb. 23					X		
130	Feb. 23	Feb. 25						X	
134	Jan. 24	Feb. 23						X	
145	Jan. 22	Feb. 15				X			
146	Jan. 20	Feb. 13				X			
147	Jan. 20	Feb. 13				X			
148	Jan. 22	Feb. 13				X			
149	Jan. 21	Feb. 25						X	
155	Feb. 9	Feb. 15						X	
158	Jan. 23	Feb. 13				X			
161	Jan. 23	Feb. 13				X			
163	Jan. 23	Feb. 13				X			
218	Jan. 28	Feb. 20						X	

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in behalf of his bill. He introduced Chief Justice James T. Harrison and Associate Justice Wesley Castles of the Supreme Court, who appeared before the committee in support of this bill. Jude Castles told the committee that this bill was prepared by the Criminal Law Commission, of which he is the Chairman. He said this bill was prepared to go along with three other House Bills 68, 69 and 453 to complete the Criminal Law Code. Judge Harrison told the committee that the Criminal Law Commission consists of three judges, who are Judge Freebourn, Judge Gulbrandson and Judge Fenton; and three county attornies, who are Gordon White, Chester Jones and Robert Morrison. He said the Supreme Court desires to have the rule making power to correct something that has to be done. He feels the Court should have this right and pointed out that Congress gave the same right to the Supreme Court of the United States. The witnesses were excused and after consideration of House Bill No. 36, Senator Lynch made a motion, seconded by Senator Goodheart, that House Bill No. 36 be not concurred in. The motion was carried.

Senate Bill No. 153 was considered by the committee. Wesley W. Wertz, attorney for the Montana Bankers Association, and Robert Burke, Chairman of the Legislative Committee of the Montana Bankers, appeared before the committee in support of this bill. Mr. Wertz told the committee that the bill was also supported by the Bankers Executive Council. He felt that this bill would be beneficial to the people who borrow and also beneficial to the people who lend. The witnesses were excused and after consideration of Senate Bill No. 153, Senator Turnage made a motion to amend the bill by omitting the word "fictitious" whereever it appears in the bill, and inserting in lieu thereof the word "reference"; further amend on page 2 of the original bill by re-numbering Section 3 to be Section 4, Section 4 to be Section 5 and Section 5 to be Section 6. The motion was seconded by Senator Rehber. The motion was carried. A motion was then made by Senator Rehberg, seconded by Senator Turnage, that Senate Bill No. 153, as amended, do pass. The motion was carried.

After consideration of Senate Bill No. 59, Senator Turnage made a motion, seconded by Senator Haughey, that Senate Bill No. 59 do pass. The motion was carried.

There being no further business, Senator Goodheart made a motion, seconded by Senator Stephens, that the meeting be adjourned. The motion was carried.

Senator Gilfeather, Chairman

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SENATE JUDICIARY COMMITTEE MEETING - February 14, 1969

The meeting was called to order by the Chairman, Senator Gilfeather. All the members were present except Senators Stephens and Bollinger.

House Bill No. 68 was taken under consideration by the committee. Professor Larry Ellison, from the Law School at the University of Montana and a member of the Criminal Law Commission and drafter of this bill, appeared before the committee in support of the bill. He told the committee that the main purpose of this bill is an attempt to try to make all the offenses of one person punishable at the same time. It will give the County Attorney a chance to clean up all the persons crimes at one time. He told the committee that the County Attorneys support this bill. Also appearing in support of this bill was Dean Jellison, a lawyer from Kalispell.

House Bill No. 69 was considered by the committee. Dean Jellison also appeared before the committee in support of this bill. He told the committee that the standards of this bill were set forth by the American Bar Association. The main provision of this bill is that, if a person has offenses in five different counties and if the County attorneys in the five counties give written approval, the person can be tried for all five offenses in one county.

House Bill No. 145 was considered by the committee. Don Garrity, a lawyer from Helena, appeared before the committee in support of this bill.

House Bill No. 289 was considered by the committee. Representative Harrison, from Lewis & Clark County, appeared before the committee in support of this bill. Don Garrity also appeared before the committee in support of this bill.

House Bill No. 155 was taken under consideration by the committee. Representative Harrison appeared before the committee in support of this bill. He told the committee that he was asked by the law firm of Meloy & Kline, of Helena, to introduce this bill.

House Bill No. 304 was considered by the committee. Representative Harrison also appeared before the committee in support of this bill. This bill was prepared by the National Conference of Commissioners on Uniform State Laws.

After the witnesses were excused Senator Gilfeather appointed the following sub-committees to work on the following bills: House Bill 94: Senators Lynch, Bollinger and Turnage. House Bill 68: Senators Turnage, Sheehy and Rehberg. House Bills 376 & 404: Senators Haughey, Goodheart and Gilfeather. House Bill 304:

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SENATE JUDICIARY COMMITTEE MEETING - February 22, 1969

The meeting was called to order by the Chairman, Senator Gilfeather. All the members were present except Senator Stephens.

After consideration of House Bill No. 68, a motion was made by Senator Rehberg, seconded by Senator Bollinger, that House Bill No. 68 be concurred in. The motion was carried.

After considering House Bill No. 69, it was moved by Senator Haughey, seconded by Senator Turnage, that House Bill No. 69 be not concurred in. The motion was carried.

After consideration of House Bill No. 109, the following amendments were suggested: Amend on page 2, Section 1, lines 4, 5, 6 and 7 of the original bill; further amend on page 2, Section 2, lines 26 and 27 of the original bill, by inserting a new Section 2 and Section 3. Senator Sheehy made a motion, seconded by Senator Turnage, that the amendments be adopted. The motion was carried. Senator Turnage then moved, seconded by Senator Sheehy, that House Bill No. 109, as amended, be concurred in. The motion was carried.

After considering House Bill No. 134, Senator Turnage made a motion, seconded by Senator Sheehy, that House Bill No. 134 be not concurred in. The motion was carried.

After consideration of House Bill No. 304, it was moved by Senator Turnage, seconded by Senator Haughey, that House Bill No. 304 be concurred in. The motion was carried.

After considering House Bill No. 310, it was moved by Senator Bollinger and seconded by Senator Sheehy that House Bill No. 310 be concurred in. The motion was carried.

After considering House Bill No. 374, Senator Haughey made a motion, seconded by Senator Bollinger, that House Bill No. 374 be concurred in. The motion was carried.

After consideration of House Bill No. 388, the following amendments were offered: Amend page 1, Section 1, lines 25, 26 and 27 of the original bill; and further amend of page 2, Section 1, lines 1 through 4 of the original bill. It was then moved by Senator Sheehy, seconded by Senator Turnage, that the amendments be adopted. The motion was carried. Senator Turnage made a motion, seconded by Senator Sheehy, that House Bill No. 388, as amended, by concurred in. The motion was carried.

After considering House Bill 389, the following amendments were proposed: Amend on page 2, Section 1, line 6 of the original. It

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was then moved by Senator Sheehy and seconded by Senator Turnage, that the amendment be adopted. The motion was carried. Senator Turnage made a motion and was seconded by Senator Sheehy, that House Bill No. 389, as amended, be concurred in. The motion was carried.

After consideration of House Bill No. 415, Senator Haughey made a motion, seconded by Senator Sheehy, that House Bill No. 415 be not concurred in. The motion was carried.

After considering House Bill No. 447, Senator Turnage made a motion, seconded by Senator Sheehy, that House Bill No. 447 be concurred in. The motion was carried.

After consideration of House Bill 497, the following amendment was offered: Amend on page 1, Section 1, line 16 of the original bill. Senator Turnage then moved and was seconded by Senator Sheehy, that House Bill No. 497, as amended, be concurred in. The motion was carried.

After considering House Bill No. 498, it was moved by Senator Goodheart, seconded by Senator Rehberg, that House Bill No. 498 be concurred in. The motion was carried.

Senator Gilfeather than assigned the following members of the committee to carry the following House bills on the floor of the Senate:
House Bill No. 68 - Senator Rehberg
House Bill No. 109 - Senator Haughey
House Bill No. 304 - Senator Gilfeather
House Bill No. 374 - Senator Goodheart
House Bill No. 310 - Senator Bollinger
House Bill No. 388 - Senator Turnage
House Bill No. 389 - Senator Turnage
House Bill No. 447 - Senator Sheehy
House Bill No. 497 - Senator Gilfeather
House Bill No. 498 - Senator Gilfeather

Senator Lynch was excused from the meeting and instructed the secretary to record his vote on the House bills as follows:

House Bill No. 68 - aye	House Bill No. 310 - aye
House Bill No. 69 - no	House Bill No. 374 - aye
House Bill No. 109 - aye	House Bill No. 388 - aye
House Bill No. 134 - no	House Bill No. 389 - aye
House Bill No. 304 - aye	House Bill No. 415 - no

A motion was made by Senator Bollinger, seconded by Senator Goodheart, that the meeting be adjourned. The motion was carried.

Senator P. J. Gilfeather, Chairman

No commitment of any such delinquent child to any institution under this act shall be deemed commitment to a penal institution. No adjudication upon the status of any delinquent child in the jurisdiction of the court shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any delinquent child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any child be charged with or convicted of any crime in any court except as provided in the preceding section of this act. The disposition of the delinquent child or any evidence given in the court shall not be admissible as evidence against the child in any other case or proceeding.

Whenever the court shall commit a delinquent child to any institution or agency, it shall transmit with the order of commitment a summary of its information concerning such child.

Separation of inmates under 21 from those over 21.

Whenever a child or an adult under the age of twenty-one (21) years is convicted of a felony or felonies or attempt to commit a felony or felonies and is sentenced to imprisonment in the state prison, he shall, throughout the term of imprisonment or until such time as he reaches the age of twenty-one (21) years, *have sleeping quarters separate and apart from inmates who are over the age of twenty-one (21) years, and additionally shall be kept separate and apart at other times in those areas where staff and facilities will permit.*"

Effective immediately.

Section 2. This bill will be effective upon passage and approval.

Approved: March 5, 1969.

CHAPTER 228

An Act to Provide Rules Governing the Defense of Double Jeopardy, Providing When Such Defense Shall or Shall Not Be a Bar to a Second Prosecution and Defining When Conduct Arising Out of the Same Transaction May or May Not Establish the Commission of More Than One Offense; Repealing Sections 94-4807, 94-6806, 94-6807, 94-6808 and 94-7234, R.C.M. 1947.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. **Definition of terms.**

(a) Same transaction. The term same transaction shall include conduct consisting of: "Same transaction."

(1) a series of acts or omissions motivated by a purpose to accomplish a criminal objective, and necessary or incidental to the accomplishment of that objective; or

(2) a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

(b) Included offense. An offense is an included offense when: "Included offense."

(1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(2) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(3) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

Section 2. **Method of prosecution when conduct constitutes more than one offense.** When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense He may not, however, be convicted of more than one offense if: Method of prosecution—more than one offense. Not to be convicted—when.

(a) one offense is included in the other; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to establish the commission of the offenses; or

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

When prosecution barred by former prosecution.

Section 3. **When prosecution barred by former prosecution.** Provided the offenses, if more than one, were known to the attorney prosecuting upon sufficient evidence to justify the filing of an information or the issuance of a warrant of arrest and were consummated prior to the original charge, and provided the jurisdiction and venue of the several offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense than the offense charged which is subsequently set aside is an acquittal of the greater inclusive offense that was charged.

(b) The former prosecution was terminated, after a complaint had been filed on a misdemeanor charge, after an information had been filed or an indictment found on a felony charge, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(c) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in:

Conviction—when.

(1) a judgment of conviction which has not been reversed or vacated,

(2) a verdict of guilty which has not been set aside and which is capable of supporting a judgment, so long as failure to enter judgment was for a reason other than a motion of the defendant,

(3) a plea of guilty accepted by the court, so long as

failure to enter judgment was for a reason other than a motion of the defendant.

(d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

Termination—when not improper.

(1) The defendant consents to the termination or waives his right to object to the termination.

(2) The trial court, in the exercise of its discretion, finds that the termination is necessary because:

(i) it is physically impossible to proceed with the trial in conformity with law; or

(ii) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(iii) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state; or

(iv) the jury is unable to agree upon a verdict; or

(v) false statements of a juror on voir dire prevent a fair trial.

Former prosecution in another jurisdiction—when a bar.

Section 4. **Former prosecution in another jurisdiction: When a bar.** When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate and/or concurrent jurisdiction in this state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

(a) The first prosecution resulted in an acquittal or in a conviction as defined in section 3 and the subsequent prosecution is based on an offense arising out of the same transaction.

(b) The former prosecution was terminated, after the complaint has been filed on a misdemeanor charge,

after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

Former prosecution before court lacking jurisdiction or when fraudulently procured by the defendant.

Section 5. **Former prosecution before court lacking jurisdiction or when fraudulently procured by the defendant.** A prosecution is not a bar within the meaning of section 3 and 4 under any of the following circumstances:

(a) The former prosecution was before a court which lacks jurisdiction over the defendant or the offense; or

(b) The former prosecution was procured by the defendant without the knowledge of the proper prosecuting officer or with the purpoise of avoiding the sentence which might otherwise be imposed; or

(c) The former prosecution resulted in a judgment of conviction which was held invalid in any post-conviction hearing.

Repealing clause.

Section 6. Sections 94-4807, 94-6806, 94-6807, 94-6808, 94-7234, R.C.M. 1947, and all acts and parts of acts in conflict herewith are hereby repealed.

Approved: March 5, 1969.

CHAPTER 229

An Act Amending Section 75-4423, R.C.M. 1947, Providing That a Community College District Shall Provide Instruction in Academic, Occupational and Adult Education, Subject to Approval of the State Board of Education.

Be it enacted by the Legislative Assembly of the State of Montana:

Amending clause.

Section 1. Section 75-4423, R.C.M. 1947, is amended to read as follows:

Courses of instruction provided—tuition fees.

"75-4423. **Courses of instruction provided — tuition fees.** A community college district organized under this act shall provide instruction, classes, school or schools

for student residents within the community college district, *in academic, occupational and adult education, subject to the approval of the state board of education.* The board of trustees of such district may in their discretion determine the per capita cost of such courses, file the same with the state board of education and upon approval thereof by the state board of education, shall require of all nondistrict residents who are accepted as pupils, a tuition fee in such sum as may be necessary for maintenance of such course or courses. A different tuition may be established as between nondistrict residents residing within the state of Montana and those residing outside the state of Montana. In addition thereto, such board of trustees may charge resident students such amounts as it deems necessary to maintain such courses, taking into consideration such other funds as may be available under law for the support of such courses."

Approved: March 5, 1969.

CHAPTER 230

An Act Establishing the Limitations on the Amount of Taxes to Be Assessed for General Municipal or Administrative Purposes, Providing a Levy for Parks, Swimming Pools, Skating Rinks, Playgrounds, Youth Centers and Other Purposes; Providing for a Levy for Recreational Uses; Amending Section 84-4701, R.C.M. 1947.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. Section 84-4701, R.C.M. 1947, is hereby amended to read as follows: Amending clause.

Limitation on amount of tax for municipal purposes—distribution of funds—levy for recreation.

"84-4701. **Limitation on amount of tax for municipal pursposes — distribution of funds — levy for park, swimming pools, playgrounds, youth centers and other purposes.** The amount of taxes to be assessed and levied for general municipal or administrative purposes in cities and towns must not exceed *two and four-tenths (2.4%) per centum* on the per centum of the assessed value of the taxable property of the city or town; and the council or commission in each city or town may distribute the money collected into such funds as are prescribed by ordi-